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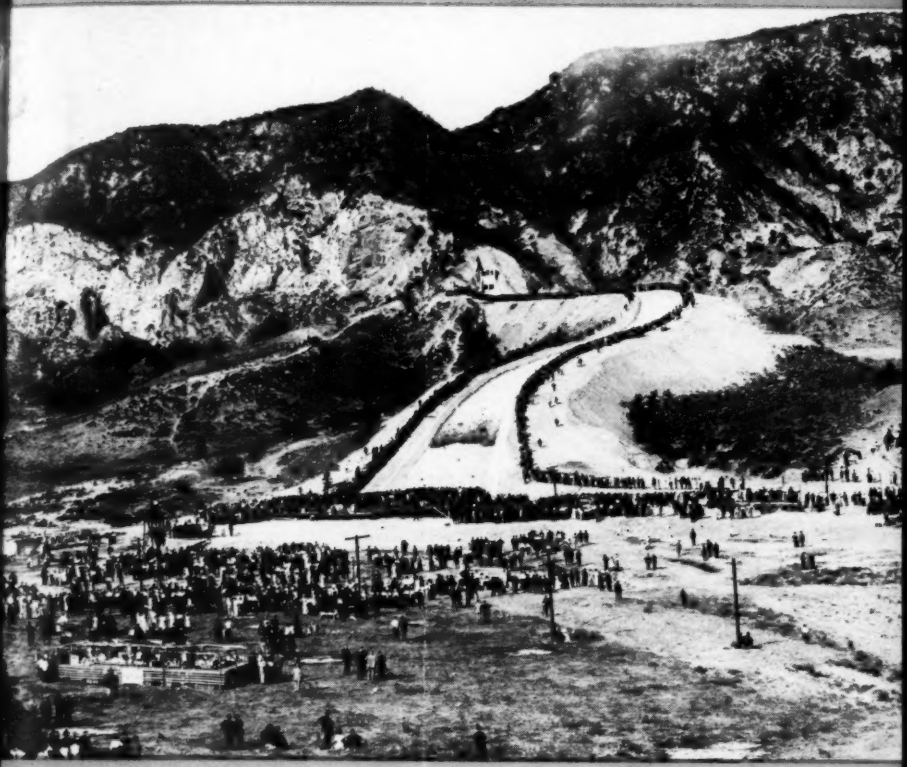

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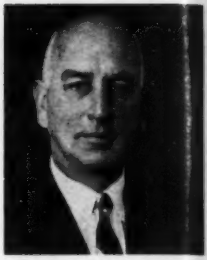

☆ ☆ ☆ ☆ ☆ ☆ ☆ ☆ A. STEVENS HALSTED, JR.

» » IN THIS ISSUE OF THE BULLETIN appears the newly-developed "Guide for Public Relations Activities for the Los Angeles County Bar Association." It deserves a careful study by every member of the Association. Prepared under the supervision of the Standing Committee on Public Relations, this statement of purposes is grounded on the experience of our Association and that of the California State Bar and the American Bar Association. The Board of Trustees has approved this Guide and hopes that it will serve the purpose its title signifies—to provide a benchmark for public relations development and measurement by the Association, individual attorneys and by our affiliated bar associations, to the extent they desire to use this platform for local public relations action.

The Committee's statement of our agreed objectives is, I am sure all will agree, one that should have every lawyer's support. The Committee has invited suggestions from all of us; and several thoughts occur to me. So, if you will bear with me:

First of all, in my opinion, there is no group that is more companionable than lawyers nor, despite the results of the 1940 survey reviewed by Judge Phillips and Judge McCoy, of greater moral strength. There are scalawags, of course, in every calling, but I cannot believe our profession has more than, or even as many as, other groups. Yet, according to this survey, only 25.3% of the persons interviewed rated lawyers as having "high" ethics, as against 60.9% for doctors and 53.6% for dentists. Parenthetically, why this discrimination between doctors and dentists? Is it because the image of the latter with his painful drill compares unfavorably with that of the former and his comforting bedside manner? In ratings as to honesty, we fared even worse, having been accorded a mere 21%—even less than the general public with 25.3%.

I am as sure these opinions are wrong as I am of other truths I cannot prove, but how to convince the public?

Although the program of the Committee is excellent I believe it can be given a boost by individual effort. The role of the individual attorney in improving our profession's public relations cannot be overemphasized. Although the American Bar Association has been carrying on an organized public relations program for more than a decade, we must recognize that the most effective national program is only as good as the local link in the distribution of the product. Face to face contact, whether it be exchanging an idea or selling merchan-

dise, is the most effective way to make the pitch.

One of the difficulties we face as lawyers is that frequently, if indeed not in most of our tasks, we are opposed by human beings—the opposing lawyer and his client. Each of the lawyers is, in a greater or lesser degree, trying to impose his client's will on the opponent. This atmosphere of antagonism, of constant strife, is the climate we work in. Human nature being what it is, it is not surprising that our efforts tend to breed anger—on the part of clients and sometimes, unfortunately, on the part of counsel as well. All of which is to say, that prejudice and bias against the opposing lawyer, most of it unwarranted, can and often does take over.

It is in this area, it seems to me, that the individual practitioner can help our public relations. We have all been challenged to explain by our lay friends how any honorable (sic) lawyer could possibly represent the defendant in the current murder case, the shocking details of which have been exploited in the daily press. Although I have been unable to answer all such inquiries satisfactorily, I like to think that my explanation has satisfied most of them.

But there is another and less spectacular field in which he can strike a telling blow for our profession. It is one thing to question the honesty of a person you don't know, which is generally the fact in notorious murder cases; it is something else again when you have met the so-and-so on the other side and know him personally—in short, the attorney you had so much trouble with in those negotiations or that lawsuit. How many times, at the conclusion of such a case, has your client expressed surprise that such an unscrupulous character (your opponent) should be allowed to practice law? The aspersions, I find, increase directly in proportion to the amount of trouble the opponent has caused you.

It is hard to get a client to view his legal difficulties objectively. It is even harder to expect him to take a kindly view of the individual who has tried so hard to frustrate him. It is in this situation, which I am sure recurs frequently, that the individual lawyer can help the bar's public relations. The natural tendency, of course, is to relax and let the client's animadversions take their course. It's not your funeral; why should you worry? But, in doing so we overlook a fruitful opportunity to build up the profession in the minds of the public. By coming to the defense of the opposing lawyer to the extent that the circumstances will permit, we show at least one member of the public—one who values our opinion—the true nature of our profession and how easy it is to let bias paint a false picture.

Try it yourself. I did so recently and was gratified when, after I had successfully prosecuted our suit against John Doe, my client confessed his bias and accepted my appraisal of the other lawyer.

"I'd never thought of a lawyer's duty in that light", my client said after I'd done my stuff.

I glowed inwardly. Doe had been a real stinker and I was afraid that my client attributed some of Doe's venom to his lawyer. But my client wasn't through. "But after all, we gave Doe a good licking." He grinned at me slyly, "I wonder if your opponent was able to make Doe think well of you!"

I still remembered Doe's ugly puss.

I shuddered. Still, it would be nice to think that my opponent tried.

THIS MONTH'S COVER

On September 5, 1905, the electors of the City of Los Angeles voted a $1,500,000 bond issue for the purchase of water rights and rights of way in the Owens River Valley and on June 12, 1907, by a ten to one margin, voted an additional $23,000,000 bond issue for the construction of an aqueduct to bring water from this area in the High Sierra to Los Angeles. Six years later, when the 225.87 mile aqueduct was completed, about 30,000 persons congregated northwest of the City of San Fernando to see the first waters come down this aqueduct. The cover photograph was taken on November 5, 1913, at the moment when the water was released. William Mulholland, chief engineer of the Water Department, who had guided the project, was to have made an address. However, overwhelmed at the moment, his entire speech was: "There it is—take it!"

The resulting availability of large amounts of water immediately led to the annexation of vast areas to the City of Los Angeles, including Hollywood and the San Fernando Valley. For example, at one election in 1915 the city's area was more than doubled—from 107.6 to 284.4 square miles. The total area of Los Angeles grew from 100.72 to 364.7 square miles during the 1915-1920 period.

Although it was believed that the construction of this Owens River Aqueduct (now officially termed the Los Angeles Aqueduct) would supply water for all future needs, it was less than ten years after the opening of the aqueduct that Los Angeles joined with others in Southern California in initiating plans to tap waters of the Colorado River, over 300 miles away. Later, the Mono Basin, some 100 miles north of the Owens River Valley, was connected to the Owens River Aqueduct. This year construction has begun on the Feather River Project to bring water from Northern California, a distance of almost 900 miles.

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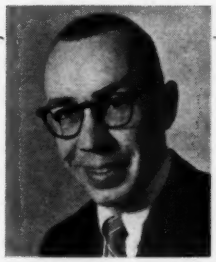
Criminal Discovery and the Alibi Defense



by
L. C. WADDINGTON
Deputy District Attorney
Los Angeles County

Third Prize Winner
1961 Justice Ashburn Junior
Barristers' Essay Contest

Mr. Waddington is a native of La Grange Illinois. He received his B.A. degree from Colorado College in 1953 and his LL.B. from U.C.L.A. Law School in 1956. He is presently a Deputy District Attorney of Los Angeles County.

» » EXCEPT FOR THE ADOPTION of the exclusionary rules of search and seizure, the rapid development of discovery techniques in criminal law has been the most important event of this decade in California. Whereas, in the field of civil discovery, the rules are based principally upon legislation by statute, rules of criminal discovery have been worked out on a case-by-case basis by the California Supreme Court. As a result of these judicially formulated rules, a defendant in a criminal action now has a greater privilege than ever before to learn the extent of the prosecution's case against him.[1]

Regardless of whether this new development is a sound policy to pursue, it is indicative of a generally recognized trend throughout the United States. That trend is one which condemns the theory of "trial by ambush." In formulating these new rules, the California Supreme Court has abandoned the common law rule that the accused could not compel production of evidence in the possession of the prosecution, and has forced the State to disclose part of its case in advance of trial—thus eliminating the element of surprise.

The theory upon which the Supreme Court proceeded was articulated in *People* v. *Riser*, 47 Cal. 2d 566. The Court stated that the cardinal principle in a criminal case was, "the ascertainment of the true facts," and: [It is] . . . "the policy of this State that the goal of criminal prosecutions is not to secure a conviction in every case by any expedient means, how-

The opinions expressed herein are those of the author and do not necessarily reflect those of the Office of the District Attorney.

[1]Cash v. Superior Court, 53 Cal 2d 72; People v. Chapman, 52 Cal. 2d 95; People v. Silberstein, 159 Cal. App. 2d 848, Tupper v. Superior Court, 51 Cal. 2d 263; People v. Cartier, 51 Cal. 2d 590; People v. Carter, 48 Cal. 2d 737; Funk v. Superior Court, 52 Cal. 2d 423; People v. Norman, 177 Cal. App. 2d 59; Vance v. Superior Court, 51 Cal. 2d 92.

ever odious, but rather, only through establishing the truth upon a public trial fair to the defendant and the State alike." *Powell* v. *Superior Court*, 48 Cal. 2d 704. If this is the foundation upon which criminal discovery rests, then it must soon become apparent that the People must be given certain rights of discovery as well as the defendant. That is, if the element of surprise is to be reduced by initiation of discovery procedures, then certainly one side should not have the advantage over the other. Thus far, unfortunately, this has not been the case.

The most obvious method of eliminating surprise to the prosecution is to require that a defendant in a criminal case give notice of his defense. Although notice of the defense of insanity is already required,[2] and double jeopardy must be pleaded,[3] no provision is made in the California Penal Code, nor by judicial construction, for advance notice of intent to rely upon any other particular defense. Here is an area where the rules of criminal discovery can be applied so as to provide their availability to the prosecution. And it is the specific defense of alibi which lends itself most readily to this application.

Alibi simply means that an accused was not present at the time and place of the commission of the offense, thus indirectly at some different location, and thereby could not have committed the alleged crime.[4] Quite clearly, alibi is a legitimate defense; but too often our trial courts stand mute witness to falsified evidence of alibi. It has been written: "That the manufactured alibi is one of the main avenues for escape of the guilty needs no demonstration. The amount of perjury that is annually committed in this connection forms a most considerable item in the mass of unpunished crime. This would be checked, and the fabricated alibi rendered most difficult if the accused were to be required to give the prosecution such notice of the intended defense as would enable it to confirm or refute the accused's assertation." Millar, The Modernization of Criminal Procedure, 11 J. Crim. L. and Criminology 344, 350 [1920]. And: "Time and again in the courtrooms of this State I have seen, 'reasonable doubt,' thrown on the testimony of State witnesses by the conflicting testimony of alibi witnesses for the defense, brought into the courtroom at almost the last minute and at a time that offered the State little or no opportunity to check either the credibility of the witnesses or the accuracy of their statements." Ohio's New Alibi Defense Law, 9 Panel 42 [1931].[5]

To remedy this abuse, several states have enacted legislation designed to curb the abuse of the defense of alibi.[6] Although all these statutes have differing language, they are designed to do several things:

1. Require a defendant in a criminal case to file a notice prior to trial that he intends to rely upon alibi as a defense.

2. Require that he specify where he was at the time and place the offense was committed.

3. Provide a list of the witnesses who will corroborate and substantiate his alibi defense.

4. Authorize the exclusion of testimony of witnesses proffered at trial who intend to testify to the defendant's alibi upon failure to comply.[7]

[2]Penal Code Sections 1016, 1017, 1026.
[3]Penal Code Sections 1016, 1017.
[4]California Jury Instructions No. 31.
[5]30 Ind. Law Journal 106 (1954-1955).
[6]Arizona, Indiana, Iowa, Kansas, Michigan, Minnesota, New Jersey, New York, Ohio, Oklahoma, South Dakota, Utah, Vermont, Wisconsin.
[7]Ariz. Crim. Proc. Rules 192 (1956); Iowa Code § 777.18 (1958); Ind. Ann. Stat. §§ 9-1931–9-1633 (Burns 1956); Kan. Gen. Stat. Ann. § 62

As a result of these statutes, commentators have indicated that the results are salutary,[8] and in *People* v. *Schade,* 292 N.Y.S. 612, the Court said in reference to that particular state's statute: "Certain it is that no innocent person can in any manner be injured by this statute. It is equally certain that the activities of criminals in manufacturing alibi defenses will be seriously checked and we will no longer have the spectacle of a defendant suddenly and brazenly flaunting a manufactured alibi in the face of the Court and of the jury."

At present, California has no statute requiring any advance notice that an alibi will be relied upon as a specific defense. In determining whether California should adopt such a statute, the experience of other states, including the problems they have faced, is helpful.

The Wisconsin alibi statute,[9] was the subject of indirect interpretation in *State* v. *Kopacka,* 51 N.W. 2d, 495. The defendant filed a notice of alibi specifying his location at the time and place the crime charged against him, burglary, was alleged to have been committed; he also filed a list of witnesses that would corroborate his testimony. At the trial, the defendant testified he was in a place different from that set out in his notice. When a witness was offered to substantiate this testimony, the court refused to allow the evidence for failure to properly comply with requirements of the alibi statute. Citing *People* v. *Schade, supra,* the Court said, "The purpose of the adoption of the alibi statutes in Ohio, Michigan, and this State, is obvious. It was designed to prevent the sudden 'popping up' of witnesses to prove that the accused was not at the scene of the crime at the time of its commission and thus creating a 'reasonable doubt' about the testimony of the state's witnesses. The bringing into the courtroom of 'phony alibi' witnesses at the eleventh hour and at a time which, in practice, affords the prosecutor no opportunity to check either the credibility of the witnesses or the accuracy of their statements is avoided by the alibi statutes. An alibi defense refuted is worse than no defense at all."

In *State* v. *Thayer,* 176 N.E., 656, the defendant failed to serve notice of alibi as required by Ohio statutes. At the trial, the Court excluded testimony of witnesses, other than the defendant himself, who were to corroborate the defendant's alibi. Following conviction, this ruling was assigned as error. The Court said: "This law pertains to a very important feature of the criminal law. It gives the state some protection against false and fraudulent claims of alibi often presented by the accused so near the close of the trial as to make it quite impossible for the state to ascertain any facts as to the credibility of the witnesses called by the accused, who may reside at some point far distant from the place of trial."

Despite favorable comment upon adoption of alibi statutes, certain objections have been raised. The most formidable of these is that alibi statutes, which require a disclosure of part of the defendant's case in advance of trial, violate the privilege against self-incrimination. In *People* v.

(Continued on page 23)

1341 (1949); Mich. Comp Laws §§ 768.20, 768.21 (1948); Minn. Stat. Ann. § 630.14 (1957); N.J. Rules 3:5-9 (1953); N.Y. Code Crim. Proc. § 295-1; Ohio Rev. Code Ann. § 2945.58 (Page 1954); Okla. Stat. tit. 22, § 585 (1951); SD Code § 34.2801 (1939); Utah Code Ann. § 77-22-17 (1953); Vt. Stat. Ann. tit. 13, §§ 6561, 6562 (1958); Wis Stat. § 955.07 (1957).

[8]9 Panel 42 (1931), Ohio's New Alibi Defense Law; 9 Panel 52 (1931), Michigan Law on Alibi, and Insanity Defenses Reduce Perjury.

[9]Wisconsin Statutes § 955.07.

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A Guide for Public Relations Activities for the Los Angeles County Bar Association

EDITOR'S NOTE: This statement of the public relations objectives and criteria of the Association was prepared by the Association's Committee on Public Relations with the help of Vincent Fowler, its public relations counsel, and has been approved by the Board of Trustees of the Association.

» » THE LEGAL PROFESSION feels it is making considerable progress in overcoming adverse public attitudes toward the individual attorney and the bar. These attitudes sometimes are expressed in such unfortunate terms as "shyster," "sharpie" and in some cases as "racketeer."

Such attitudes have been revealed in surveys taken by state and local bar associations . . . and are attributed to unethical practices which the profession has fought through the years.

Just as the legal profession takes action through its disciplinary machinery to right wrongs that a few attorneys may be responsible for, the profession can, by continuous public education, overcome adverse public attitudes. That is the role of the ABA, the California State Bar and the Los Angeles County Bar Association public relations programs.

Therefore, the following study has been developed by your Public Relations Committee and its public relations counsel as a guide for public relations planning and activities by both the Los Angeles County Bar Association and, to the extent possible, individual attorneys.

It is worth noting that both the American Bar Association and the State Bar of California are reviewing their organized public relations programs and are taking steps to strengthen their activities.

The ABA, for example, sponsored a National Institute on Bar Public Relations Problems during its annual meeting in St. Louis in August. The Institute discussed ways of: improving the profession's public image; reaching high school students; dispelling misunderstanding about lawyers' fees; publicizing the perils of unauthorized practice; improving the lawyer's eval-

uation of himself; and pooling state, local and national public relations efforts. The Institute was sponsored by the ABA Committee on Public Relations. The Los Angeles County Bar Association was represented by Stanley L. Johnson, Executive Secretary, and Vincent R. Fowler, public relations counsel, who also was a speaker on the program.

The California State Bar has surveyed its 20,000 members for their opinions on the organization's 12-year-old program. Results showed that 68 per cent of the respondents think public opinion in the state is generally favorable to the legal profession, and 60 per cent think the State Bar's public relations program is doing an effective job in improving the profession's public image.

A survey of public opinion in the state covering the same questions asked of attorneys is desirable to provide the State Bar an objective, outside viewpoint on which to plan future programs.

Consensus of the attorneys responding in the State Bar survey was that public relations projects should include (a) stricter enforcement of the rules of professional conduct, (b) a program to increase the income of lawyers, and (c) encouragement of lawyers to participate more actively in public affairs. All of this is in line with the thinking expressed over the past year by your Public Relations Committee.

The profession in California has had no recent in-depth measurement of public attitudes toward the profession equal in scope, it is felt, to that made available in 1940 to the State Bar of California entitled, "Public Opinion Survey of the Legal Profession." The report was based on interviews with 2,572 persons in California.

While the survey report never has been published, the following excerpt from it appears in the book, "Conduct of Judges and Lawyers," by Judges Orrie L. Phillips and Philbrick McCoy.

The authors stated that the analysis of the answers to the first question quoted as follows as indicative of the views of the public at that time:

I. How would you rank doctors, dentists, lawyers, and people generally as to their:

ETHICS

	High	Avg.	Low	Don't Know
Doctors	60.9%	29.7%	4.7%	4.7%
Dentists	53.6	37.3	4.2	4.9
Lawyers	25.3	41.4	20.3	13.0
People generally	25.0	62.2	8.6	4.2

HONESTY

	High	Avg.	Low	Don't Know
Doctors	51.1%	39.5%	5.5%	3.9%
Dentists	48.1	42.8	4.8	4.3
Lawyers	21.0	43.7	24.1	11.2
People generally	25.3	62.9	7.9	3.9

In their comments on this report the authors said this is a "sad commentary on the standing of the legal profession in the community".

It would be a valuable investment in planning future public relations activities for the State Bar of California and local and county associations if questions asked in the 1940 and other public opinion surveys available to the profession were rechecked with the public now. The current results would provide a measurement of public opinion against the known results of past surveys to determine if any progress has been made in improving public attitudes.

Now, against the backdrop of ABA and State Bar thinking on public relations objectives and programming, let us examine the status of the Los Angeles County Bar Association's own public relations posture:

It has a program—but no statement of objectives serving to guide the program.

Its current program includes both external and internal elements.

The future holds a wide variety of public relations opportunities for this Association to capitalize upon through individual members and the Bar as a whole.

Obviously, a statement of agreed-upon objectives is essential, since it will serve to orient the individual thinking and actions of members of the bar, to provide a guide in developing specific public relations projects, and to provide a guide for evaluating expenditures of money.

Your Public Relations Committee therefore proposes the following as "The Los Angeles County Bar Association's Statement of Public Relations objectives"—which are adapted to local needs from the ABA's published public relations objectives:

1. Educate and re-educate the public as to the significance of the lawyers and courts, and the indispensability of each to the preservation of the American form of society and government.

2. Educate the lawyer as to his own individual responsibility to the community, to his clients, and to his fellow lawyers, and afford him the opportunity to continue his legal education. Re-emphasize to him his obligations in his daily practice under the Canons and his oath taken on admission to the Bar.

3. Improve the administration of justice, so as to insure fair and impartial adjudication of cases, and their speediest disposition consistent with justice.

4. Encourage the improvement of Legal Aid for those who cannot afford to pay for legal service.

5. Publicize the public services of the Los Angeles County Bar Association provided through the Association's standing committees such as: Lawyer Referral, Unlawful Practice, Federal Court Criminal Indigent Defense, Civil Service Examinations, Arbitration, Psychiatric and Criminal Appeals.

6. Encourage by proper authorities the handling of all grievances against lawyers promptly and efficiently, and impose available disciplinary action, where such action is warranted.

The external public relations and communications techniques employed in our program include a Speakers Bureau; publicity for our monthly meetings and other Association activities; publicity for the Federal Court Criminal Indigent Panel and Lawyers Referral Service, and other study committees and Association sustaining programs; publication and distribution of such pamphlets as "An Hour of Prevention" and "When To See An Attorney"; sponsorship of Law Day observance (with the Speakers Bureau and publicity-promotion services of P.R. counsel coordinated with your Public Relations Committee); and publicity on the judicial plebiscite.

Internally, our Program includes the BAR BULLETIN which covers the findings of regular standing committees, association activities and special research of interest to members. Also, public relations counsel works with the Board of Trustees and the Executive Secretary in development of special communications to the membership as desired.

What of the future? What are some of the public relations opportunities that lie ahead for our Association? Consider these possible projects which could be developed:

A preventive law program, with in-

dividual attorney participation. Institutional advertising. Expanded and extended public information about law and lawyers, legal fees, court and legal procedures. Education of attorneys in individual public relations practices—the deskside manner, keeping clients oriented on work being done for them, explanation of fees, etc., which might be done either through pamphlets or a public relations institute or seminar.

Having at this point proposed a "Statement of Public Relations Objectives" for your consideration, and having outlined our Association's current public relations Program with an indication of possible public relations projects for the future, your Public Relations Committee now wishes to suggest a set of criteria for evaluating ALL of our programs and projects.

We feel that each and every program developed by our Association, or by this Committee on our Association's behalf, in accordance with policy approved by the Board of Trustees, should be measured against these standards:

1. *Is it in the public interest?*
2. *Is it good for the individual lawyer as well as for the profession as a whole?*
3. *Does it conflict with anything being done by the ABA or the State Bar of California?* Here, it should be kept in mind that both organizations have carried on organized public relations programs over the years—and are stepping up their efforts.
4. *Does it comply with our Association's "Statement of Public Relations Objectives"?* In development of even the most modest project, involving relationships between the Association and its members, or the profession and the public, consideration of this criterion is vital.

Your comments on this platform of purposes and suggestions for public relations projects to implement them are wanted. Please send them to the Committee on Public Relations in care of Association headquarters.

PERSONS WHO SERVED ON THE FEDERAL COURTS CRIMINAL INDIGENT DEFENSE PANEL DURING OCTOBER, 1961

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NEGATIVE BASIS

by CARL A. STUTSMAN, JR.

Mr. Stutsman is a member of the International, American and Massachusetts Bar Associations, and for two years has served as Chairman of the Committee on Procedure in Fraud Cases of the Taxation Section, American Bar Association. Also a member of the Los Angeles County Bar Association Committee on Taxation, he has authored numerous books and articles in the tax field. He received his B.A. and LL.B. degrees from University of Southern California in 1934 and 1937, respectively, and is a partner in the Los Angeles firm of Hill, Farrer & Burrill.

» » ONE OF THE MORE ESOTERIC PROBLEMS of the tax law which some lawyers might refer to by way of convincing themselves that they were right all along in having nothing whatsoever to do with taxes, is a subject which has been termed "negative basis." A recent decision of the Ninth Circuit Court of Appeals, reversing the Tax Court, contains an illuminating discussion of the subject, even though the opinion may ultimately represent a minority view. It also highlights the type of unexpected difficulty that can arise to plague a lawyer who deals with tax issues not knowing that he does so.

Generally stated, basis of property is a tax expression representing the amount by which a gain or loss will be measured in cases of taxable dispositions. If you buy property for $1,000.00 and sell it for $2,000.00, your basis is $1,000.00 and your taxable gain is the other $1,000.00. The question of negative basis arises in situations where the "cost" of the property works out to be a figure below zero because of unexpected tax results from its transfer.

The issue in the *Easson* case (C.A. 9, No. 17170, September 8, 1961 reversing 31 T.C. 963) arose out of a supposedly tax-free transfer of property to a corporation with all the stock being issued to the individual who was the transferor. His trials grew out of the fact that the property in question had a mortgage against it which he had created prior to the transfer to the corporation. In round figures, his basis of cost of the property was $80,000.00, its agreed market value when contributed was $320,000.00, and it was then encumbered by a $250,000.00 mortgage. The $250,000.00 received from the lending institution had been invested in short-term government securities assertedly to maintain business liquidity. This fact was determined by the Tax Court not to indicate tax avoidance motives. Had this fact not been found, still another section would have become operative to affect the otherwise tax-free incorporation.

Since an incorporation is normally tax free under Section 351 Internal Revenue Code, being a transfer of property to a wholly owned corporation in return for all of its stock, the property owner apparently did not

consider any tax problems existed. He overlooked a little-known area of the law now codified in Section 357(c) of the Internal Revenue Code and Section 17440(c) of the California Revenue and Taxation Code. The sections in effect provide that if the property transferred in organizing a corporation is subject to liabilities which exceed the basis of the property to the owner, the excess will constitute a gain from the sale or exchange of a capital asset or of a non-capital asset, as the case may be; the latter, of course, producing ordinary income.

This case arose under the 1939 Internal Revenue Code. Under the law since 1954, Mr. Easson would have lost his case. Fortunately for him, the Ninth Circuit Court of Appeals did not become overwhelmed with what the Tax Court thought would be potential tax avoidance if this difference were not taxed at the time the corporation was organized. If the property had a basis of $80,000.00, but was worth $320,000.00 when transferred to the new corporation no tax would ordinarily arise but the basis of the stock received would be the $80,000.00 figure.

Under the law however this $80,000.00 basis for the stock must be reduced by the amount of any mortgage assumed by the corporation and would also be increased by the amount of any gain then taxed. To use an illustration of the Court: property costing only $1,000.00 but worth $10,000.00 is contributed for stock. Ordinarily the stock would carry the same $1,000.00 as its basis. Assuming, however, the property was subject to a $500.00 mortgage, the normal $1,000.00 cost basis for the stock would then be reduced to $500.00. Thus if the taxpayer sold his stock later for $10,000.00, he would have a taxable gain of $9,500.00, instead of $9,000.00. This result is justified since presumably he pocketed the $500.00.

This rule produced the instant tax problem since you can't subtract $250,000.00 from $80,000.00 without reaching a negative figure. The Tax Court refused to create a $170,000.00 ($80,000.00 – $250,000.00) negative basis and said that the stock must be valued at not below zero and the "gain" taxed when the corporation was organized. The Ninth Circuit refused to agree, and in effect said his stock had a minus value of $170,000.00, so that if he later sold it for an amount equal to the $70,000.00 corporation equity ($320,000.00 property value less $250,000.00 mortgage) his taxable gain would then be not $70,000.00 but $240,000.00.

It must be admitted that the result reached by one court is as logical as the other. The $250,000.00 in hand from the borrowing was, of course, not "income" at that point since a duty to repay existed. The split between the two decisions was basically on the point of when do we impose the tax.

A discussion of this case was indicated not so much because of the unusual results reached by the two courts, but because of the unexpected tax problem Mr. Easson faced, relating to his basis. If your clients are transferring encumbered property to a corporation in what is expected to be a tax free transaction, be sure to question the reasons behind the encumbrance, learn what was done with the money borrowed, and satisfy yourself as to amount of your client's cost basis for the property. Otherwise, proceed with caution.

notes from your Law Library

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CONSTITUTIONAL LAW: *State Constitutional Revision in California* by E. A. Engelbert (UCLA Bureau of Government Research, 68 p.) documents the need for a new constitution, the attempts at drafting and the current prospects of obtaining an effective constitution. A bibliography is included.

CRIME: *Kidnap* by George Waller (Dial, 597 p.) is a detailed account of the kidnapping of the Lindbergh baby and the subsequent arrest and trial of Bruno Richard Hauptmann. New Jersey criminal procedure in pre-Vanderbilt days is revealed in the story of the trial and the appeals.

CRIMINAL PROCEDURE: *Criminal Law Seminar,* edited by Nathan Cohn (Central, 351 p.) is a transcription of many short talks given at a seminar in San Francisco. The criminal process from arrest to appeal is the subject matter. Justice Peters deals with the preparation of briefs on appeal; J. W. Ehrlich discusses interviews and fees. The use of informants, search and seizure, reduction of charges, discovery, test cases, expert witnesses, and jury selection are reviewed. Witkin describes the extraordinary writs, while James MacInnis covers cross-examination; Gregory Stout and Bernard Diamond, M.D., consider the psychiatric aspects. Conduct of narcotics cases, murder trials, drunk driving cases and juvenile court proceedings are specifically explained. Both prosecution and defense points of view are presented.

CRIMINAL PROCEDURE: *Successful Techniques in the Trial of Criminal Cases* by H. B. Rothblatt of the New York and California Bars (Prentice-Hall, 242 p.) is designed for the beginner in the criminal field as well as the experienced civil lawyer who tries a criminal case. Done in a didactic style, there are few case citations.

ESTATE PLANNING: *Estate Planning* by A. James Casner (Little Brown, 2 v.) now appears in an expanded third edition. Brought up to date, it consists of cases, materials, and problems.

GOVERNMENT: *Secrecy and Publicity: Dilemmas of Democracy,* by F. E. Rourke (Johns Hopkins, 236 p.) discusses the complicated problem of the influence of information from the government and the effect of withholding on public opinion. Bureaucratic secrecy and the power of publicity are examined in the light of current experiences, such as the U-2 incident. There is a chapter on publicity and the law.

INDIANS: *The Caughnawaga Indians and the St. Lawrence Seaway* by O. Z.

Ghobashy, (Devin-Adair, 137 p.) is another aspect of the treatment of Indians by a settling government. This is an account of the relations of the Canadian Government and a band of Indians who had a reservation which was expropriated as a part of the St. Lawrence project.

JURISPRUDENCE: *Justice Holmes, Natural Law, and the Supreme Court* by Francis Biddle (Macmillan, 77 p.) traces the development of Holmes and the attack on him by the proponents of natural law because of his rejection of absolutes. The final lecture is devoted to a consideration of what standards judges should apply in deciding cases.

SEGREGATION: *Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation* by J. W. Peltason (Harcourt, Brace & World, 270 p.) is a review of the story of the School Segregation Cases and the development of integration. Because Congress and the Executive have played little part in the proceedings, the judges in the Federal Courts have been responsible for the changes which have occurred.

TAXATION: *Taxation of Securities Transactions* by J. F. Gelband (Prentice-Hall, 176 p.) treats the income tax provisions of the IRC as they apply to sales and exchanges of stocks and bonds. Holding period, basis of valuation, identification, wash and short sales, puts and calls, dividends, and stock rights are discussed. There are few citations.

TORTS: *Legal Essays of the Plaintiff's Advocate,* edited by Robert Klonsky (Central, 490 p.) reprints a selection of articles from a magazine published by a New York affiliate of NACCA. There are articles on the jury system, maritime law and aviation, trial tactics and techniques, medicine, and products liability. Averbach, Gair, Speiser, Lambert and Pound are among the contributors.

TRADE REGULATION: The Bureau of National Affairs' *Antitrust and Trade Regulation Report* is issued weekly. It contains news items, digests of court decisions, speeches, and an analysis of current problems. Cumulative indices serve as a guide to the contents.

TRIALS: *The Judges and the Judged* by Edgar Lustgarten (Odhams, 320 p.) is a collection of narrative accounts of 90 trials centering on the judges, the accused, witnesses and cases both sensational and scandalous. Whittaker Chambers, Libby Holman, Lord Haw Haw and Lord Goddard appear in a diverse collection of cases from American and British courts. Some testimony is reproduced.

ZONING: *Planning and Zoning in the United States* by B. J. Pooley (University of Michigan Legislative Research Center, 123 p.) considers one aspect of modern metropolitan development. A discussion of the origins of zoning laws and their administration is followed by a description of the modern trends. Enabling acts for zoning and planning are also treated.

GOVERNMENT PUBLICATIONS: *Stock Options,* hearings before the Senate Committee on Finance on S. 1625 (186 p.) contains testimony and reprints of articles on the special treatment accorded employee stock options. The Department of Commerce has published a *Manual on Uniform Traffic Control Devices for Streets and Highways,* prepared by a number of interested organizations (333 p.).

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BAR ACTIVITIES *Calendar*

Committees

November 1—Federal Rules and Practice, 12:15 p.m.

November 2—Tax, 12:15 p.m.

November 3—Public Relations, 12:15 p.m.

November 7—Judiciary, 3:00 p.m.

November 8—Ethics, 12:15 p.m.

November 13—Membership, 4:00 p.m.

November 16 – Nominating Committee, 4:00 p.m.

November 30 – Continuing Education of the Bar, 5:00 p.m.

Sections

November 9—Tax Talk, Conference Room #8, Biltmore, Luncheon, 12 noon. "Negotiations and Planning for Income Taxes." Dean S. Butler, speaker.

Junior Barristers

November 2 – Annual Stag Dinner, University Club, 5:50 p.m.

November 17—Monthly Luncheon meeting, University Club, 12:15 p.m.

General Monthly Meeting

November 16—Biltmore Bowl, 12 noon. Speaker, Hon. Stanley Mosk. Title: "Lawyer for the State."

Annual Hi-Jinks

December 1 – Statler-Hilton Hotel, 6:30 p.m.

Affiliated Associations

November 3—San Gabriel Valley Bar Association, Ricky's Restaurant, 12:15 p.m. Speaker, Hon. Gordon L. Files. Topic: "Writ and Receivers."

November 9—Inglewood District Bar Association will not hold a regular monthly meeting because on that date a Testimonial Dinner will be given in honor of Judge Vernon P. Spencer.

November 13—Santa Monica Bay District Bar Association, Fox and Hounds Restaurant, 6:30 p.m. Speakers, Frank L. Humphrey, Vice President of Security 1st National Bank and Edmond R. Davis, assistant trust counsel. Topic: "Trusts Draftmanship – Some Practical Aspects."

November 15—Pasadena Bar Association, Pasadena University Club, 6:00 p.m. Speaker, W. S. McClanahan, Trust Officer of California Bank. Topic: New Probate and Trust Legislation.

November 15—Glendale Bar Association, Pikes Verdugo Oaks Restaurant, 6:30 p.m. Speaker, Warren Dorn, Supervisor, Los Angeles County.

November 16—Pomona Valley Bar Association, Huddle Restaurant, Covina, 6:30 p.m. Speaker, Dr. Houston I. Siournoy, assemblyman from 49th district. Topic: Report on 1961 Legislature.

November 17 – Compton Judicial District Bar Association, Marc's Restaurant, 12 noon.

November 17—Long Beach Bar Association, Virginia Country Club. Speaker, Gus McClanahan, Trust Officer of United California Bank. Topic: Recent changes in the Probate Code.

November 21—Southeast District Bar Association, King's Restaurant, 6:30 p.m.

November 21—San Fernando Valley Bar Association, Pucci Restaurant, 6:00 p.m. A business and election meeting.

State Bar of California

September 17 to 21, 1962—Thirty-fourth annual meeting, Beverly Hilton Hotel, Beverly Hills.

American Bar Association

February, 1962 – Mid-Winter Meeting, Chicago, Illinois.

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Schade, supra, the Court examined the question as it pertained to the New York statute regarding the privilege against self-incrimination.[10] Finding there was no compulsive force, the Court said: "[T]here is nothing about the section [295-L of the Code of Criminal Procedure] which compels the defendant to incriminate himself, nor is there anything which compels him to give any information to the District Attorney unless he voluntarily and for his own benefit intends to use an alibi defense." Other states have upheld their alibi statute against attacks of unconstitutionality. *State* v. *Thayer, supra; People* v. *Kopacka, supra; Smetana* v. *State,* 2 N.E. 2d, 778; *People* v. *Shulenberg,* 112 N.Y. 374; cf *People* v. *Wudarski,* 234 N.W., 157.

In California the constitutional privilege against self-incrimination is found in Article I, Section 13. It provides: "No person shall . . . be compelled in any criminal case to be a witness against himself." This is almost the exact language of the New York statute and consequently a similar interpretation might well be given by California courts.

A second objection to the statute is on the ground that it violates either Federal or State concepts of due process. The alibi statute might, under certain circumstances, deprive the defendant of a fair trial by virtue of its application to a particular case. For example, California requires that criminal pleadings need only allege that a crime was committed "on or about" a specific date. In felony proceedings, a preliminary hearing prior to trial supplies the details of the crime as well as the time and place of its occurrence. Occasionally, however, a witness may be vague about the exact or even approximate *date* of the crime.[11] In such an event, a preliminary hearing does not enable the defendant to formulate with any certainty where he was at the time the crime was alleged to have occurred. Under such circumstances the defendant could not easily fulfill the requirements of an alibi statute. He cannot be expected to account for his whereabouts where there are several days variance in the time of the crime. Consequently, the trial court should relieve him of his burden to comply with the alibi statute and allow the defendant such latitude as is deemed necessary for a full defense. Undoubtedly many fact situations can be presented where it would be unfair to compel the defendant to comply strictly with the alibi statute, and to do so would deprive him of a fair trial. Both trial and appellate courts can remedy any unfair deprivation of the defendant's right to a fair trial.

In *People* v. *Wright,* 16 N.Y.S. 2d 593, the defendant moved the court for an order compelling the District Attorney to furnish a bill of particulars more specifically setting forth the time and place of the alleged crime. The order was granted, the court indicating that the adoption of the alibi statute made it more necessary than before that the defendant be advised with exactitude as to the

[10]New York Constitution, Art. 1, § 6: "No person . . . shall be compelled in any criminal case to be a witness against himself."

[11]The author has experienced cases involving testimony of young children wherein no exact date of an alleged crime can be ascertained, sometimes not even a particular *month.* In such cases the testimony of an adult testifying to the child's complaint is the only method of determining any degree of certainty, but where the crime is a continuing offense, even this method is not satisfactory.

time and place the crime is alleged to have been committed. Although the opinion does not specify "due process" specifically, it seems apparent that this is the underlying theory.

In *State* v. *Thayer, supra,* a bribery prosecution, the State's chief witness testified that the crime took place between the dates of August 10th and 20th; other witnesses placed it as being between August 10th and August 28th. Because the defendant did not give the required notice of his intention to rely upon an alibi as a defense, the alibi testimony was excluded by the court. A concurring opinion indicated that under such evidence the defendant would have been unable to comply satisfactorily with the statute, and that the operative effect of the statute as applied, deprived the defendant of due process.

In California this objection could properly be raised pursuant to Article I, Section 13 of the California Constitution which provides: "No person shall be . . . deprived of life, liberty, or property without due process of law. . . ."

A third problem is whether the testimony of the defendant himself could be excluded, under an alibi statute which so provides, if he failed to give proper notice.

In *Smetana* v. *State,* 2 N.E. 2d 778, the defendant's testimony was excluded in a case involving malicious destruction of property. The court re-

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viewed its own constitutional provisions and determined that the right of the defendant to testify in his own behalf is a statutory right, not a constitutional right, and the legislature can regulate it as is deemed necessary.

But in *People v. Rakiec,* 45 N.E. 2d 812, by virtue of statutory construction, the Court decided that the defendant could not be precluded from testifying in his own behalf as to his alibi, regardless of his failure to comply with the requirements of the alibi statute.

In California the defendant is made a competent witness by virtue of Penal Code Section 1323. Although there may be an implication in Article I Section 13 of the California Constitution that the defendant's testimony may have constitutional sanction, it is at least questionable. Consequently, if California were to adopt an alibi statute without any specific reference to the exclusion of the testimony of the defendant himself it would be a matter for judicial determination. Of course the language of the statute itself could provide whether or not the defendant could testify himself upon failure to notify the prosecution of the defense of alibi.

Ultimately, then, the decision upon whether to adopt an alibi statute in California rests upon policy considerations, rather than constitutional objections. It is significant that three of the largest states in the Union have

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alibi statutes and, as indicated before, apparently are satisfied with the results achieved by them.

In California a bill was introduced in the 1961 session of the California legislature requiring advance notice of alibi defense, but the measure was never passed.[12] Principal opposition seems to be based not on the wording of the statute, nor upon constitutional grounds, but rather that defense witnesses, if named in advance of trial, will be subjected to intimidation by public officials.[13] What evidence there is to support this viewpoint has not been disclosed. Since, however, the purpose of an alibi statute is to check out the validity of the alibi defense, it should be presumed that this would be done lawfully and impartially. Because this fear of intimidation has never been amplified, it is difficult to provide answers. But it would seem likely that the courts could provide a remedy for any such abuse of the investigative process. Certainly some vague fear should not block the passage of an otherwise salutary law. And such fears of intimidation are clearly disproportionate to the abuse which now exists in criminal courts in the use of alibi testimony.

Moreover, since prosecution witnesses must testify at the preliminary hearing in the defendant's presence prior to the time of trial, they are just as likely to be subjected to intimidation by the defendant as are defense witnesses. But this has never been ascribed as a reason for eliminating preliminary hearings.

If an alibi statute is adopted, it should receive careful drafting. Basically it should provide for:

1. Written notice by the defendant

[12]Assembly Bill 484, introduced January 17, 1961.
[13]California State Bar Journal, Vol. 36, page 487; Committee Report—Criminal Law and Procedure.

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to the prosecution that alibi will be the specific defense relied upon. The defendant is the only one in a position to know his defense, not the prosecution, and the burden should be upon him. In the event that the defendant requires more specificity as to dates and times he may compel a bill of particulars from the prosecution. In most felony cases this information will already have been made available to the defendant.

2. A statement of the specific whereabouts of the defendant at the time and place the crime is alleged to have occurred. The reason for being specific is obvious if any effective investigation is to be undertaken as to the defense.

3. A list of witnesses, including addresses and phone numbers, whom the defendant intends to call to substantiate his alibi.

4. A penalty of exclusion of alibi testimony if the defendant fails to comply with the above requirements. This is the only effective method that has been found by other states for enforcing the alibi statutes. Perhaps a properly drafted instruction might be an alternative, though less effective device.

5. A provision which allows the trial judge in his discretion to permit alibi testimony by defense witnesses where failure to do so would infringe upon any substantial right of the defendant to a fair trial. This provision is essential to avoid any unfair advantage which might obtain by invoking the sanctions of the statute.

6. A provision excluding the defendant from application of the statute and allowing him to testify in his own behalf. The purpose of the statute is to eliminate surprise witnesses, which obviously would not include the defendant. Investigation should be able to confirm or refute the defendant's own alibi testimony.

California population has increased in size until it is today the second largest state. Concentrated population has increased the problems of law enforcement to the extent that relief should be granted where needed. A carefully drawn alibi statute will eliminate the abuse of fabricated testimony which has been tolerated too long. Then California may join other states in providing the People of the State of California, as well as the defendant, a fair and impartial trial. And it will bring into balance, at last, the concept of criminal discovery so as to assure a "public trial fair to the defendant and the State alike."[14]

[14]Powell v. Superior Court, 48 Cal. 2d 704.

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BROTHERS-IN-LAW

By
GEORGE
HARNAGEL, JR.

SAMUEL WILLISTON (II)

With an Unduly Long Philosophical Foreword

We recall reading somewhere that somebody—possibly Thomas Carlyle—said that he had the gift of carriage conversation. By that he meant that when returning home in his carriage from a dinner party he habitually thought of all of the brilliant things he should have said. Since the carriage and the art of conversation went into a decline at about the same time, we have never had much trouble along that line, but we have observed how frequently and perversely inspiration, recollection or information arrives just a bit late.

Item: The better answer we *could* have given the court which occurs to us on our way back to the office.

Item: That elusive name which flashes into our mind the moment after an old acquaintance has passed by and we have greeted him with a safe but unflattering "Hi".

Item: The item we encounter just after an issue of THE BULLETIN has gone to press which we would like to have used in *Brothers-in-Law*. That happens so often we have become inured to it. To cite the most recent example, last month we ran a little story about Samuel Williston and just after the forms were locked up we encountered the following tribute to legal education in general and Professor Williston in particular which we would have used in our story if we'd happened on it a bit sooner:

> "Whatever ability I may have to reason in a straight line from premise to conclusion derives from the discipline of those three years [in law school] and especially from Professor Williston and his horse Dobbin. I lost hours of sleep, pounds of flesh, buckets of cold sweat over Dobbin, the hero of every suppositious contract, the villain of every supposititious sale. From Professor Williston I also learned that one can be proved a fool so quietly and inexorably that the fool will harbor neither anger nor resentment." Reprinted from *Lanterns on the Levee* by William Alexander Percy, by permission of Alfred A. Knopf, Inc.

That last sentence will strike a responsive chord in the memory of anyone who ever sat under the benign smile of the Old Master.

• • •

Unethical Defense Tactics

A Charlottesville attorney was suing on a cut and dried account which his client assured him was due and owing. After the plaintiff's evidence was in, the defendant arose and, to the shocked amazement of counsel for plaintiff, presented a receipt in full signed by the plaintiff. Quickly taking his client aside, counsel demanded an explanation. "That damned liar," expostulated his irate client. "That damned, double crossing liar," he re-

peated with emphasis, "he told me he had lost that receipt."—*Virginia Bar News.*

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Echoes of Europotpourri

From the number of readers who were moved by the report on our summer's travels in the September issue to share with us their European experiences or expectations, we have concluded that the bar, like all Gaul, is divided into three parts: Those that want to go; those that want to go back; and those that want to go back again. We were surprised and, of course, pleased to hear from so many, and if we don't manage to drop you a personal note of thanks, please consider this is it.

One consequence of our report was the receipt from John Pollock of a sleek little volume of cartoons and commentary entitled "Continental Cans, Etc., A Tourist's Guide to European Plumbing", by Perrin C. Smith and Ruth Wilcox, published in 1960. We had written that the field was wide open for handbooks on certain practical subjects of interest to tourists, among them the 57 and more varieties of plumbing encountered on a European holiday. Evidently John wanted us to know that one is already available on that subject. The piece that reminded us the most of our own experiences is entitled "Douche It Yourself". It deals with the portable shower head which is fitted to a flexible length of hose and supplied for use without benefit of shower curtain. Before you can master its fall-out pattern you have drenched everything in the bathroom, except possibly yourself.

Without qualifying our thanks to John we must note that while the book presents the problems, and quite hilariously, it is short on solutions.

Another surprising result was an invitation from the Honorable Walter P. Jones, Presiding Judge of the Ala-

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bama Circuit Court, at Montgomery, and editor of *Alabama Lawyer,* addressed to the architect of this column and his wife, to "come down South and let me show you around". We are writing him that he should not be surprised if we do just that one of these years because (i) we have traveled less in the South, particularly in the Southeast, than anywhere else in the country, and (ii) we know from the recent example of Vice President Lyndon B. Johnson and Bashir Ahmad, the Pakistani camel driver, that Southerners stand behind their invitations, however light-heartedly extended.

• • •

Trick or Treatise?

An anonymous educator writing in *UCLA Docket,* published by the UCLA Law Students Association, comes out with a strong endorsement of a new Hornbook series which he says has recently been made available by the Coram Non Judice Press. The series includes:

Oedipus on DOMESTIC RELATIONS.
Judas on TRUSTS.
Shylock on CREDITOR'S RIGHTS.
Nixon on FUTURE INTERESTS.
Eichmann on INTERNATIONAL LAW.
Cohen (Mickey) on INCOME TAX.
Peter on AGENCY.
Welch (Robert) on CONSTITUTIONAL LAW.
H. J. Caruso on SALES.

• • •

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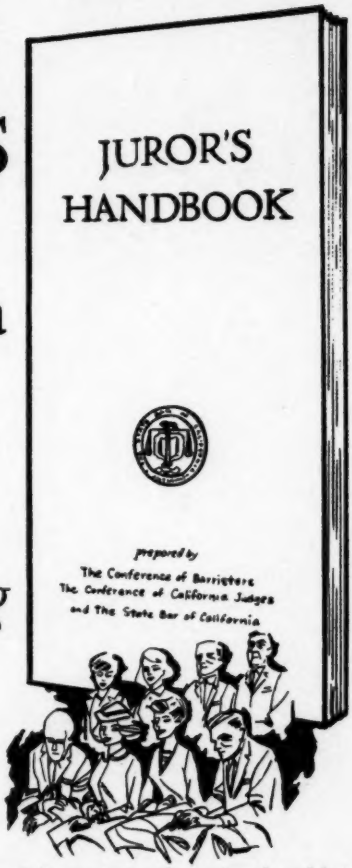

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FIRST: [illegible] wife's name is MARY [illegible]ely: My daughter, SALLY DO[illegible] and my son, EDWARD DOE, born August 18, 1942. For convenience I shall hereinafter sometimes refer to said MARY DOE as "my wife" to said SALLY DOE as "SALLY", and to said EDWARD DOE as "EDWARD"

SECOND: I intend by this Will to dispose of all property

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